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Citation: 5 Cornell J. L. and Pub. Pol'y. 1 1995-1996

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EXCUSING AND PUNISHING  
IN CRIMINAL ADJUDICATION: A REALITY CHECK

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I.

The popular press is replete with stories claiming the so-called “abuse excuse” typifies a proliferating array of blame-shifting psychological defenses in criminal proceedings.<sup>1</sup> Some writers further suggest these so-called “syndrome defenses” reflect and reveal a softening of public attitudes toward personal responsibility and a greater willingness to excuse criminal wrongdoing.<sup>2</sup>

Though these are empirical claims, I doubt they are true. First, there is no evidence the law is becoming more receptive to excuse claims. When so-called syndrome evidence has been admitted on a defendant’s behalf, the evidence has almost always been relevant either to well-established defenses, such as self-defense or duress, or to previously established grounds of mitigation in murder cases, such as the “extreme mental or emotional disturbance” which reduces murder to manslaughter in New York. Second, there is no persuasive evidence that judges or juries are now more frequently excusing defendants. Of course, there are occasional verdicts which seem to stretch or even nullify the governing law. However, these cases are aberrations. Admittedly, these aberrational verdicts could signal a trend if they reflect or portend a sympathetic change in the community’s moral intuitions. But there is little, if any, evidence that the public at large is becoming more receptive to blame-shifting defenses. If anything, I detect a hardening public attitude, not a more forgiving one. In short, the supposed proliferation of excuses is a figment of the media’s collective imagination.

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<sup>1</sup> See, e.g., Robert Davis, *We Live in Age of Exotic Defenses*, USA TODAY, Nov. 22, 1994, at A1 [hereinafter Davis]; Margot Slade, *At the Bar*, N.Y. TIMES, May 20, 1994, at B20.

<sup>2</sup> See, e.g., Stephanie B. Goldberg, *Fault Lines*, A.B.A. J., June 1994, at 40-42 [hereinafter Goldberg].

My claim is proven by reading a sample of newspaper and magazine articles (or broadcast media transcripts) which purport to document the “trend” toward proliferating excuses. These stories follow a standard format: They describe a recent trial of local interest, using it as a springboard to discuss the “abuse excuse” trend and including quotations from defense attorneys who applaud the trend and quotations from prosecutors who decry it. The following article is illustrative:

On June 30, 1994, the Associated Press ran a story datelined from Los Angeles entitled “More Accused Turn to Abuse as an Excuse.”<sup>3</sup> The lead paragraph described a case in which a man named Moosa Hanoukai was convicted of manslaughter, and received an eleven-year prison sentence, for fatally beating his wife with a wrench. Obviously, Mr. Hanoukai was not excused. However, the reporter’s angle on the case was that Mr. Hanoukai received a relatively light sentence because he *did not* get convicted of murder. Hanoukai’s attorney characterized the manslaughter conviction as a “major victory.”

How was this victory achieved? The lawyer argued that Mr. Hanoukai had been psychologically emasculated by his over-controlling wife when she forced him to sleep on the floor, repeatedly called him names and paid him a nominal wage. These actions caused him to lose self-esteem. Although the article does specify this, I assume that Hanoukai lost emotional control because of some specific provoking episode, and that his account of his mental and emotional state at the time of the offense was relevant, under California law, to whether he had the “malice” required for a murder conviction.

There is nothing new in Hanoukai’s case. In general terms, men who kill their wives can be grouped into two categories. First, the largest group of spouse-killing men includes abusive men who are highly possessive and who will not tolerate independent actions by their wives, particularly any effort to terminate the relationship.<sup>4</sup> Of course, this was the prosecution’s theory in the

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<sup>3</sup> Niko Price, *More Accused Turn to Abuse as an Excuse*, CHI. TRIB., June 30, 1994, at News 8 [hereinafter Price].

<sup>4</sup> See, e.g., Irene Hanson Frieze & Angela Browne, *Violence in Marriage* in CRIMINAL JUSTICE, VOLUME II 163-218 (Lloyd Ohlin & Michael Tonry eds. 1989). This chapter presents a review of the pertinent research on marital violence. Men who batter their wives monitor and control their wives’ whereabouts. Women who try to leave abusive partners have been followed and harassed for months, or even years. Some of the women who attempt to leave their partners

O.J. Simpson case. The second group of male spouse-killers includes weak, passive-dependent men who cling to an emotionally demeaning relationship with a dominant woman despite persistent ridicule, taunts, and general subordination. The homicide in these cases typically occurs at a moment of anguish or rage precipitated by the wife's threat to sever the relationship on which the husband has become so dependent.<sup>5</sup>

The Hanoukai case fits this second pattern—a pattern or “syndrome” which my colleagues and I described in forensic literature more than fifteen years ago.<sup>6</sup> As we noted then, the legal relevance of this clinical picture depends on the distinction between murder and manslaughter. Under the traditional common-law approach, the clinical story is irrelevant unless the wife engaged in legally adequate provocation which could be expected to arouse passion in an ordinary person. Under traditional rules, mere taunting would be insufficient.<sup>7</sup> However, cumulative provocation would be enough to get to a jury in many jurisdictions, including California.<sup>8</sup> Moreover, some jurisdictions have abandoned the traditional approach for a much broader, more subjective theory of mitigation which is not tied to provocation, but is instead much closer to the concept of diminished mental responsibility.<sup>9</sup> New York has taken this approach.<sup>10</sup> The bottom line, then, is that there is nothing surprising about the Hanoukai verdict. California law quite clearly allows the defense to offer a mitigating psychological explanation of Hanoukai's conduct and permits a jury to accept it. The verdict represents an uncontroversial application of an established legal concept.

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have been killed. *Id.* at 184. “Evidence suggests that, in many cases, the man's violence continues to escalate after a separation.” *Id.* at 207. See also Russell P. Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 SOCIAL PROBLEMS, 71-91 (1992). “Men commonly hunt down and kill wives who have left them; women hardly ever behave similarly . . . men kill wives in response to revelation of wifely infidelity; women almost never respond similarly, though their mates are more often adulterous.” *Id.* at 81.

<sup>5</sup> C. Robert Showalter et al., *The Spousal-Homicide Syndrome*, 3 INT'L J. L. & PSYCHIATRY 117, 127-128 (1980).

<sup>6</sup> *Id.*; See also Richard J. Bonnie et al., *The Spousal Homicide Syndrome: Legal Implications*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 431 (1980).

<sup>7</sup> *Id.* at 436-37.

<sup>8</sup> See, e.g., *People v. Borchers*, 325 P.2d 97, 102 (Cal. 1958).

<sup>9</sup> MODEL PENAL CODE § 210.3(1)(b) & commentaries (1962).

<sup>10</sup> N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1987).

This understanding of the law was not, however, the perspective reflected in the Associated Press story. This story implied that the Hanoukai verdict was both innovative and representative of an emerging trend to recognize the so-called “abuse excuse.” The article reports, according to “legal experts,” that decisions such as the Hanoukai case “are becoming more and more common.”<sup>11</sup> One must ask, what is the evidence for this assertion?

Predictably, the article refers to the Menendez brothers’ trial for killing their parents to support its assertion about the proliferation of the “abuse excuse.” Although the defendants were permitted to introduce extensive parental abuse evidence, the legal relevance of this evidence was never very clear. Affording the trial judge the benefit of the doubt, the abuse evidence may have been relevant to the doctrine of “imperfect self-defense.” This doctrine states that even if the boys were not in danger of a fatal attack by their father, an honest belief that they were in danger would reduce murder to manslaughter under California law. Thus, abuse evidence was offered to support their claim that they genuinely believed themselves to be in danger. Although this claim seems implausible, and has no relevance to the killing of their mother, the juries for each defendant were hung on whether the brothers were guilty of murder or manslaughter.<sup>12</sup>

The article also mentions the trial of Daimion Osby in Fort Worth, Texas. Osby was charged with shooting two unarmed black men on the street.<sup>13</sup> Osby claimed self-defense and sought to support his claim by testifying that he had won \$400 from the victims at an illegal gambling establishment, that they had been harassing him, and that he was fearful they would attack him. To counter the prosecution’s argument that there was no objective basis for such fear, the defense argued that Osby, a black man who had been raised in a violent neighborhood, had developed an intense fear of young black men. The theory was packaged as the “urban survival syndrome.” Although the Osby defense is not related to abuse, a willingness to accept it could suggest a certain soft-headedness about excuses. However, this defense did not succeed. Osby’s first jury was hung. His second jury convicted him of murder and sentenced him to life imprisonment.<sup>14</sup>

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<sup>11</sup> Price, *supra* note 3, at News 8.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Davis, *supra* note 1, at A1.

So far, the evidence supporting the claim of proliferating excuses is two juries who could not decide whether the defendants were guilty of murder or a reduced form of homicide.

The Associated Press story then mentions Lorena Bobbitt, who severed her husband's penis with a knife.<sup>15</sup> For the moment, I will assume Lorena Bobbitt's acquittal represented an "abuse excuse" rather than a standard insanity defense. Standing alone, however, the acquittal is an aberration and does not signify a trend.

Surprisingly, the article also makes reference to the then-anticipated trial of Colin Ferguson who was charged with killing six people and wounding nineteen on a Long Island Rail Road commuter train.<sup>16</sup> The Ferguson case was thought to be relevant to the story because Ferguson's lawyers, Ronald Kuby and William Kunstler, had indicated that "black rage" had driven Ferguson insane. However, as Kunstler and Kuby later stated in a letter to the *New York Times*,<sup>17</sup> their proposed strategy was not innovative. Kunstler and Kuby were intending to mount "a traditional insanity defense," predicated upon the diagnosis of a severe mental disorder.<sup>18</sup>

The moral basis of the insanity defense lies in the pathology of the psyche, not in the pathology of social relations. From this standpoint, the trial of Colin Ferguson is completely tangential to the underlying theme of the proliferating excuse story—the idea that even ordinary people, who should be held to normal standards of responsibility, are being allowed to shift blame to their abusers or to the pernicious influences of their environment. This is why a trend toward proliferating excuses would be so dangerous—if it were really a trend. Such arguments would endanger the norm of personal responsibility lying at the heart of the criminal law. Proof of the criminal act would become a prelude to the adjudication of excuses—clinical vignettes about the travails of the defendant's life. Fortunately, we are in no danger of such a transformative modification of criminal law.

The fictional abuse-excuse trend was given further attention in an article in the *Chicago Tribune* on December 26, 1994 under a headline and lead

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<sup>15</sup> Price, *supra* note 3, at News 8.

<sup>16</sup> *Id.*

<sup>17</sup> Letter from William M. Kunstler & Ronald L. Kuby to the Editor, *N.Y. TIMES*, April 28, 1994, at A22.

<sup>18</sup> Price, *supra* note 3, at News 8.

story suggesting the “abuse excuse” strategy had suffered a setback.<sup>19</sup> The lead paragraph discusses a recent trial in which a DePage County, Illinois jury convicted seventeen-year old Eric Robles, of murdering his mother and father. The jury rejected an insanity claim partially predicated on a history of abusive conduct by Eric’s father. Thus, the Robles verdict was a counterpoint to the supposed abuse-excuse trend. Nonetheless, the article describes the trend, emphasizes the continuing controversy surrounding the trend, and provides the standard references to Lorena Bobbitt and the Menendez brothers. It also adds the customary quotation from Alan Dershowitz who observes that defense lawyers are increasingly invoking the abuse strategy. Dershowitz traces a line connecting the battered woman syndrome to the battered child syndrome, to the black rage syndrome, to the distant father syndrome, to the Holocaust survivor syndrome.

It *is* possible that defense attorneys are increasingly inclined to package their psychological evidence in the language of “syndromes.” In my opinion, however, what is new is the marketing strategy, not the product. Attorneys have been seeking psychological or psychiatric assessments with increasing frequency for the past thirty years. Mental health professionals specializing in forensic assessment know that very few psychological explanations for criminal conduct are relevant to any recognized excuse or formal mitigation. Defense attorneys seek this assistance primarily for use in the sentencing process, while hoping that the mental health evidence will be admitted at trial so the jury can hear it. In cases of uncontested conduct, the most sensible defense strategy is to offer a blame-shifting explanation to dampen the judge’s and jury’s enthusiasm for punishment. This is a time-tested strategy. The only new angle is that enterprising experts have become adept at giving names to their clinical explanations.

Each day, it seems, a new “syndrome” is described on the witness stand and appears in the newspapers. It then appears on NEXIS or some other database. In this way, every story becomes accessible to the next journalist looking for an angle on a local trial. Each article refers to the same handful of cases in support of the hypothesis that excuses are proliferating—the trials of Lorena Bobbitt, Lyle and Erik Menendez, and Daimion Osby. However, these cases do not provide persuasive evidence of such a trend, or of a more general

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<sup>19</sup> Tom Pelton, *Robles Trial a Setback for ‘Abuse’ Tactic*, CHI. TRIB., Dec. 26, 1994, at 1.

tendency in our society “to encourage evasions of responsibility” as Professor Dershowitz has suggested.<sup>20</sup> In my opinion, the abuse excuse trend is unadorned hyperbole. As Gertrude Stein reportedly said of Oakland, “There is no there there.” Nevertheless, there is a lot of smoke. Perhaps we should probe more deeply. It is possible that something less profound is going on beneath the surface of the headlines.

## II.

There are two specific questions embedded in the general claim of proliferating excuses: First, has the judicial inclination to admit abuse evidence become unmanageable? Do abused women and children now have a “license to kill?” Second, is the insanity defense becoming a blame-shifting loophole which enables normal people who lose control in fits of rage, panic or jealousy to escape justice? The acquittal of Lorena Bobbitt stands at the intersection of these two questions.

The willingness of courts to allow women charged with killing their husbands to introduce evidence of the “battered woman’s syndrome” is fully compatible with the contemporary law of self-defense. It has long been understood that the test of reasonableness in self-defense law is applied from the viewpoint of a person in the defendant’s situation.<sup>21</sup> Evidence describing the battered woman’s syndrome gives the defendant a fair opportunity to explain to the jury how she came to feel that her life was threatened, why she did not leave the abusive relationship, and why she saw no other way out of her predicament. Most courts have properly ruled that as long as the evidence satisfies the usual requirements for expert opinion, it should be admitted.<sup>22</sup>

Courts and commentators recognized from the outset that one of the risks in admitting evidence of past abuse was that sympathetic juries would acquit the battered woman, not because defensive action was reasonably necessary, but because her abuser deserved what he got. This risk is not peculiar to the battered woman syndrome. It arises whenever evidence regarding the behavior of the deceased is admitted to support a self-defense claim. It also arises

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<sup>20</sup> *Id.* at 2.

<sup>21</sup> Gail D. Rodwan & Jeanice A. Dagher-Margosian, *The Battered Woman as Criminal Defendant*, 73 MICH. BUS. L.J. 912, 913 (1994).

<sup>22</sup> *See, e.g., State v. Kelly*, 478 A.2d 364 (N.J. 1984).

in other murder prosecutions in which the defendant seeks to show provocation by the victim. The contemporary trend in all these contexts is to make the legal standard for excuse or mitigation more subjective and open-textured, thereby opening the door to more psychological evidence. As I have said, however, the risk of admitting this evidence is that the jury's sympathy for the defendant and distaste for the victim will erode the objective standard, or will provoke outright nullification of the governing law.

The pertinent question is whether a pattern of nullification has emerged in practice. Have courts and juries become unduly sympathetic to women who kill their husbands? Do abused women now have a "license to kill?"

Systematic studies of adjudications involving women who have killed their spouses are sparse. Ideally, we would like to know whether self-defense claims are more prevalent now than in the past, whether evidence of abuse is more often introduced today than yesterday, and whether dismissals or acquittals are now occurring with higher frequency. The available evidence does not support these hypotheses.

We should first note that women are in far greater danger of injury and death in intimate relationships than are men.<sup>23</sup> Women are victimized by spouses and other intimates at ten times the rate of male victimization.<sup>24</sup> Among all intimate killings, 70% of the victims are female.<sup>25</sup> An estimated 1500 females were killed by intimates in 1992, as compared with 650 males.<sup>26</sup> Contrary to the hypothesis that softening attitudes toward excuse invite women to kill their abusers, the rate of female spouse killings has *decreased* substantially in recent years, while the prevalence of violence *against* women has *increased*.<sup>27</sup>

When women *do* kill their spouses or spouse-equivalents, the great majority (75%) are convicted.<sup>28</sup> This conviction rate is somewhat lower than the 90% conviction rate for men charged with killing intimates.<sup>29</sup> One would

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<sup>23</sup> BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 3 (1994).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.*

expect a lower conviction rate for females because the likelihood of defensive killings is obviously higher among the female defendants. In fact, 25% strikes me as the *minimum* expected rate of defensive killings among women who kill intimates.

Finally, women who are convicted of killing their spouses are punished less severely than their male counterparts. Female defendants are somewhat less likely to be convicted of first degree murder (18% versus 24%), somewhat more likely to be convicted of manslaughter (54% versus 37%), and somewhat less likely to be sentenced to prison (81% versus 94%).<sup>30</sup> The average prison sentence, however, is substantially less—6.2 years for women convicted of killing their husbands versus 17.5 years for men convicted of killing their wives.<sup>31</sup> Although less severe punishment might suggest a pattern of leniency toward women, the differential treatment of men and women appears to be entirely attributable to differences in prior record. In a study of state prisoners incarcerated for harming intimates, 34% of the men incarcerated for harming their wives or girlfriends had previous convictions for a violent offense, as compared with only 13% of the women. Conversely, 72% of the women were first offenders, compared with only 30% of the males.<sup>32</sup>

In sum, the available data do not support the proposition that abused women have a license to kill their abusers. On the contrary, the data reveal an upward trend for victimization of women, not for their being excused.

### III.

I believe the insanity defense is essential to the moral integrity of the criminal law.<sup>33</sup> A just penal law must take adequate account of the morally relevant incapacitating effects of severe mental illness. However, the insanity defense must be narrowly framed and carefully administered to reduce the risk of moral mistake. This can be accomplished by insisting on proof of a severe mental disorder, and by eliminating the so-called volitional prong of the defense. A person should be acquitted by reason of insanity only if, as a result of a severe mental disorder, she was unable to appreciate the wrongful-

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 8.

<sup>33</sup> Richard J. Bonnie, *The Moral Basis for the Insanity Defense*, 69 A.B.A. J. 194 (1983).

ness of her conduct at the time of the offense.<sup>34</sup> This formula for insanity is similar to the test in New York.<sup>35</sup>

For critics of the insanity defense, the most problematic case is when a person without any previous history of mental disorder claims to have had a brief episode of mental illness, lasting for roughly the length of time it took to commit a serious crime, which then evaporates completely, without need for therapeutic intervention, after trial. When such a moral mistake is made, as in Lorena Bobbitt's case,<sup>36</sup> or in April Dell'Olio's recent murder trial in New York,<sup>37</sup> the insanity defense understandably comes into the eye of public controversy.

Before discussing these cases, we should put the problem of mistake in empirical perspective. First, a successful insanity defense is a rare event. Historically, the defense is raised in only one percent of felony cases and is only successful in a small fraction of those cases.<sup>38</sup> In New York, the rates are even lower for a successful insanity defense. Though, there were approximately 175,000 criminal convictions in New York in 1993, there were only *sixty* insanity acquittals.<sup>39</sup> In Virginia, there are fewer than twenty insanity acquittals each year.<sup>40</sup> Second, most insanity pleas are uncontested. There is no disagreement among the experts and the insanity plea is endorsed by the prosecution. Thus, when we focus on the insanity pleas which are contested at trial, we are discussing a very small number of cases.

However, this small number of contested insanity adjudications has a profound impact on popular judgments about criminal justice. These cases typically receive a great deal of media attention. This is one of the reasons the insanity defense is so important. The adjudication of an insanity claim has great pedagogical value. By considering the possibility that a person was so mentally disordered that he should not be held responsible for his actions, we

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<sup>34</sup> *Id.* at 197.

<sup>35</sup> N.Y. PENAL LAW § 40-15 (McKinney 1987).

<sup>36</sup> Price, *supra* note 3, at News 8. Lorena was sentenced to ninety days of therapy.

<sup>37</sup> *A Sentence of Therapy in a Slaying*, N.Y. TIMES, Dec. 5, 1993, at 57. April was sentenced to five years of outpatient therapy [hereinafter *Slaying*].

<sup>38</sup> Goldberg, *supra* note 2, at 42.

<sup>39</sup> Jessica Ancker, *Slain Teen's Mother Seeks Curb on Insanity Defense*, THE RECORD, Feb. 9, 1994, at A4.

<sup>40</sup> Telephone Interview with Patricia Griffin, Dir. of Forensic Serv., Va. Dep't of Mental Health, Mental Retardation, & Substance Abuse Serv. (June 10, 1995).

remind ourselves of the general postulates of free choice and personal responsibility which provide the moral foundation for the social practice of criminal punishment. By acknowledging the possibility of an exception, we reaffirm the general rule. Usually, an exception is not made, the insanity plea is rejected, and the defendant is convicted. This is because juries have a strong predisposing skepticism about insanity claims. Regardless of the formal allocation of the burden of proof, the defendant must always bear the burden of demonstrating both the clinical plausibility and the moral persuasiveness of an insanity claim.

Thus, when a jury accepts an insanity plea, it is always a surprise, and it always receives a great deal of media attention. As a result, the impact of the verdict is magnified in the public mind. The impact is further magnified when the insanity verdict does not appear to be grounded in severe mental disorder. This is why the acquittal of Lorena Bobbitt continues to attract so much attention.

Lorena Bobbitt's trial can be interpreted at two levels. At one level, it can be analyzed as a standard insanity adjudication. This assessment would focus on whether she was mentally ill at the time of the offense and, if she was mentally ill, on how any clinical disorder she may have suffered affected her conduct. The experts on both sides agreed she had been traumatized by her husband's behavior, and that she was distraught and depressed. However, distress and depression do not provide a clinical basis for an insanity defense. A defense of insanity requires a severe mental disorder with psychotic manifestations. On this issue, the testimony of the experts diverged, with the defense expert supporting the claim that she was psychotic at the time of the offense, and the prosecution expert rejecting this formulation.

If the case is interpreted at this level, it can be subjected to a fairly standard critique. The relevant questions are those that should be asked about any contested insanity adjudication: Why did the experts disagree? Was there a reasonable difference of clinical opinion? Was one opinion implausible? In cases of acquittal, did the jury make what I call a "moral mistake?" If they did, why did they make this mistake?

Though these are interesting questions, I want to discuss the subtext of the Bobbitt adjudication. The case was packaged as an insanity case. Yet, beneath the dispute about Lorena Bobbitt's mental condition was a story about John Bobbitt's provocation and about Lorena Bobbitt's rage. In the

final analysis, the case was about whether she can fairly be blamed for retaliating against him.

How one reacts to Lorena Bobbitt's acquittal depends on which story one thinks is the real story. Was the conflict with her husband the situational context for Lorena's mental illness, or did the evidence of mental illness provide cover for a claim that was really about rage and retaliation in a dysfunctional marriage? As the abuse-excuse literature makes clear, the social meaning of Lorena Bobbitt's acquittal can only be understood from this second viewpoint. From this perspective, her acquittal was a "moral mistake."

The law does not—and should not—exculpate people who hurt other people because they were enraged, even if they were cruelly provoked. Nor does the law permit people to strike back at their tormentors, unless they need to do so to protect themselves. Though John Bobbitt may have "had it coming to him," the moral belief that "he deserved it" is not a defense. From this perspective, Lorena Bobbitt had no legal defense.

By using the insanity defense, Lorena was able to put into evidence the history of abuse and, in effect, she was able to put John Bobbitt on trial for a second time. The bottom line is that the insanity defense was used as an instrument of jury nullification.

Lorena Bobbitt's case is unique in many respects. However, from the perspective of history, the case can be assigned to a somewhat larger class of insanity acquittals. The insanity defense occasionally serves as a "safety valve" for legally unrecognized claims of situational excuse. The classic cases of situational excuse involve euthanasia.

In one publicized New Jersey case about twenty years ago, a twenty-three-year-old man shot his beloved brother who had been irreversibly paralyzed below the neck in a motorcycle accident. The victim, who was suffering severe pain, begged his brother to end his life. Three days after the accident, the defendant walked into the hospital room and asked his brother if he was still suffering. The brother nodded. The defendant then said: "Well, I'm here today to end your pain. Is that all right with you?" His brother nodded. The defendant then said: "Close your eyes, George. I'm going to kill you," placed his gun against his brother's temple, and pulled the trigger.<sup>41</sup>

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<sup>41</sup> PETER W. LOW ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 623 (2d ed. 1986).

Anglo-American law has never regarded mercy killing as justifiable homicide, although the matter has not been free of moral controversy. Because the law does not recognize a claim of situational excuse in such a case, the defendant pleaded insanity and the jury acquitted him by reason of insanity.

An outlet for nullification is not a bad thing, as long as it does not occur too often, and as long as juries do not stray too far outside the criminal law's moral boundaries. Unfortunately, Lorena Bobbitt's acquittal does raise these concerns because it suggests that cases of rage and retaliation can be repackaged as claims of mental disorder.

This leads me to the trial of April Dell'Olio.<sup>42</sup> April Dell'Olio began to date David Eggleston in December of 1990 when she was twelve and a half years of age and he was fifteen years of age. They had a stormy relationship until David jilted her in the fall of 1992. The account of their relationship is one that is familiar to every one who has ever been a teenager in America—a story of infatuation, disappointment, confrontation, jealousy, possessiveness, and anger. In addition, if David taunted her as the defense claimed, there was also an element of adolescent cruelty. Unfortunately, this story of unrequited teenage love deviated wildly from the norm. On October 20, 1992, April Dell'Olio, then fourteen years old, murdered David Eggleston by stabbing him twenty-three times.

April pleaded insanity. Her expert witnesses testified that she had experienced a "brief active psychosis" during the killing. Apparently, this "psychosis" was so brief that she went to school within one hour of the fatal episode. The jury acquitted her on grounds of insanity. However, when April was examined by psychiatrists at the University of Rochester after the trial, these psychiatrists found she was not mentally ill. The trial judge ordered her to undergo five years of outpatient treatment, and expressed outrage at what he obviously regarded as a profound miscarriage of justice. Judge Dowd reportedly said: "A young man is dead, and basically I am hamstrung [by the law] to treat it like the psychological equivalent of 'April had a bad hair day on Oct. 20, 1992.'"<sup>43</sup>

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<sup>42</sup> *Slaying*, *supra* note 37, at 57.

<sup>43</sup> *Id.*

Judging from the report of the Rochester psychiatrists, the comments of the trial judge, and the community reaction, April Dell'Olio's insanity acquittal seems to represent a moral mistake. Her crime has gone unpunished.

Why did this happen? One possibility is that the psychiatrists testifying for the defense were too naive and were manipulated by Ms. Dell'Olio, and that their erroneous clinical formulation was not adequately countered by the prosecution. This left the jury without a persuasive alternative to the clinical picture depicted by the defense psychiatrists.

As I noted earlier, however, my experience has taught me that juries tend to be highly skeptical about claims of insanity, especially in homicide cases. In addition, the Rochester psychiatrists did not seem to find any plausible basis for the clinical formulation offered by the defense. Thus, it is a puzzle why the jury believed the insanity claim.

Is there a subtext in the Dell'Olio acquittal, or is this just a case where the jurors had "the wool pulled over their eyes?" The answer may relate to the jurisdictional borders between the criminal court and the juvenile court in murder cases. Under the law of New York, criminal court jurisdiction is *mandatory* for murder prosecutions if the accused was thirteen at the time of the offense.<sup>44</sup> In most states, criminal court jurisdiction is not even permitted at age thirteen. In almost all other states, criminal court jurisdiction for such youths is permitted but is rarely exercised.<sup>45</sup> I suspect the jury's verdict reflected a preference for a rehabilitative disposition, rather than a punitive one—a preference responsive as much to April Dell'Olio's youthfulness as to her supposed psychopathology. If she had been twelve at the time of the offense, April would have been tried in juvenile court, and would have been confined in a juvenile correctional facility for an indeterminate period up to her twenty-first birthday.<sup>46</sup> The public's ambivalent yearning for punishment *and* for a rehabilitative intervention would then have been satisfied. However, because April was tried in criminal court, this disposition was not available. Instead, the choice was between a harsh criminal disposition, and the therapeutic alternative represented by an insanity acquittal.

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<sup>44</sup> N.Y. PENAL LAW § 30.00 (McKinney 1987).

<sup>45</sup> Richard J. Bonnie, *Juvenile Homicide: A Study in Legal Ambivalence*, in JUV. HOMICIDE 183 (Elissa P. Benedek & Dewey G. Cornell eds., 1989) [hereinafter *Juvenile Homicide*].

<sup>46</sup> Merrill Sobie, *Practice Commentary*, N.Y. FAM. CT. ACT § 302.2 (McKinney 1983).

If my speculation is correct, the insanity acquittal in April Dell'Olio's case represents a nullification of New York's decision to adopt a jurisdictional age of thirteen for murder cases. If this interpretation is correct, public attention in the wake of the trial should have been focussed on the jurisdictional age of criminal court adjudication, rather than on the insanity defense.

#### IV.

I do not hesitate to say the Dell'Olio verdict was a moral mistake when viewed from the perspective of the law of criminal responsibility. However, that perspective is not the only pertinent perspective. If my interpretation of the jury's verdict is correct, we should also ask whether the jury's decision to use the insanity verdict as a way of evading the lengthy imprisonment of a fourteen-year-old girl was morally unjustified. In other words, given the jury's choices, the insanity acquittal was not necessarily a moral mistake.

Consideration of this question would lead us into the thicket of an intriguing jurisprudential debate about nullifying or disobeying the law. To take this path would deviate too much from the focus of this article. Instead, I want to return finally to the theme with which I began: I see no evidence of a proliferation of excuses, or of a softening of public attitudes toward criminal punishment. Instead, I see abundant evidence of a hardening of public attitudes, and a general abandonment of the individualizing features of criminal justice administration. Three-strike laws have mutated into one-strike mandatory sentences. State governments are unable to find money for health care and education because they need it to build more prisons. The Republican "Contract with America" calls for repealing the 1994 Federal Crime Bill because it was not sufficiently hard on criminals and because it appropriated too much money for crime prevention.

The hardening of criminal justice is most evident in the unyielding attitude being taken toward the punishment of adolescents. Throughout the country, states are abandoning the juvenile court, lowering the age of transfer, and broadening the class of transferrable offenses.<sup>47</sup> Even within juvenile corrections, penalties are being increased. A recent study conducted by researchers from the University of Virginia Psychology Department revealed

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<sup>47</sup> See generally Joseph B. Sanborn, Jr., *Certification to Criminal Court: The Important Policy Questions of How, When, and Why*, 40 CRIME & DELINQ. 262 (1994).

that more than 60% of prospective jurors would prescribe capital punishment for a ten year old murder defendant.<sup>48</sup>

Consider New York's Steuben County trial of Eric Smith for brutally killing four-year old Derrick Robie. Eric was thirteen when he committed the offense on August 2, 1993.<sup>49</sup> Eric's trial is often mentioned in the "abuse-excuse" genre because the defense claimed that Eric suffered from an "intermittent explosive disorder" attributable in part to verbal and physical abuse by his stepfather. The jury convicted Eric of second degree murder, rejecting the insanity defense and rejecting various legal theories for reducing the offense to manslaughter. A manslaughter verdict would have been a victory for the defense because it would have required the case to be transferred to Family Court. Instead, Eric was sentenced to the maximum term of nine years to life in prison. He will serve his time in a juvenile facility until turning eighteen. He then will be transferred to an adult prison.<sup>50</sup>

The significance of Eric Smith's case does not lie in the abuse-excuse angle. Instead, its significance lies in the fact that a thirteen-year-old boy was tried and sentenced as an adult. The contrasting verdicts in the trials of April Dell'Olio and Eric Smith epitomize our society's profound ambivalence toward juvenile criminality, particularly toward adolescent homicide.<sup>51</sup>

I would argue that, in general, the abuse-excuse angle distorts and obscures the real significance of the cases reviewed in this article. Lorena Bobbitt's case—the single clear-cut instance of an abuse excuse—was a curiosity and a source of humor and entertainment. It has no other deep or enduring significance. In sobering contrast, the Dell'Olio and Smith cases raise fundamental questions about crime and criminal justice in this country. Why is juvenile violence on the rise? Why are kids killing kids with increasing frequency? Why *did* Daimion Osby kill two young black men on the streets of Fort Worth? Why *did* Eric Smith kill Derrick Robie? Why *did* April Dell'Olio kill David Eggleston? Why *did* Eric Robles kill his parents in

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<sup>48</sup> Catherine A. Crosby et al., *The Juvenile Death Penalty and the Eighth Amendment: An Empirical Investigation of Societal Consensus and Proportionality*, 19 L. & HUM. BEHAV. 245, 257 (1995).

<sup>49</sup> Bob Weigand & Tom Buckham, *Savona Teen Found Guilty of Murder, Faces 9 Years to Life*, BUFF. NEWS, Aug. 17, 1994, at A1.

<sup>50</sup> Tom Buckham, *Teen Will Serve Nine Years to Life for Killing Boy; Eric Smith, 14, Sentenced in Death of Savona 4-Year-Old*, BUFF. NEWS, Nov. 7, 1994, at A1.

<sup>51</sup> *Juvenile Homicide*, *supra* note 45.

DePage County, Illinois? Why *did* the Menendez brothers kill their parents? Why *did* Bryan and David Freeman of Lehigh County, Pennsylvania, ages seventeen and fifteen, shave their heads, wear military uniforms, embrace a neo-Nazi subculture, tattoo their foreheads with the words “Sieg Heil” and “Berserker,” and, on February 26, 1995, brutally murder their parents and their eleven-year-old brother?<sup>52</sup> What is happening to our children?

The theme of Cornell Journal of Law and Public Policy’s recent symposium is that some of these cases present a choice between excusing and punishing. As I pointed out earlier, they also present a choice between rehabilitating and incapacitating. However, from the standpoint of society’s long-term well-being, all these questions come too late. We need to pay attention to the abundant signs of danger. The important question is whether we will try to save our children from the rising tide of violence—or whether we will yield them to it.

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<sup>52</sup> *Skinhead Brothers Charged with Killing of Family Members*, N.Y. TIMES, March 3, 1995, at A14.

